

SIDE-BY-SIDE

ARTICLE 5- Protection of Persons under disabilities and their property -- Part 3

ARTICLE 5: Part 3 EXISTING CODE LANGUAGE	Bill # S. 1243 Article 5 Part 3
Article 5.Part 3. Guardians of Incapacitated Persons	Article 5.Part 3.
<p>SECTION 62-5-302. Venue.</p> <p>The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.</p>	<p>SECTION 62-5-301.</p> <p>(a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given twenty days prior written notice of intention to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.</p> <p>(b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given twenty days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.</p> <p>(c) This State shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.</p> <p>(d) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the succeeding section of this Part. <u>Subject to the provisions of Sections 62-5-701 et seq., venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is committed to an institution pursuant to an order of a court of competent jurisdiction, venue is also in the county in which that court sits.</u></p>

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SECTION 62-5-301. Testamentary appointment of guardian for incapacitated person.

- (a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given twenty days prior written notice of intention to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.
- (b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given twenty days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.
- (c) This State shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.
- (d) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the succeeding section of this Part.

REPORTER'S COMMENTS

Prior to the 2012 amendment, Section 62-5-301 was Section 62-5-302. The Section was amended to include reference to the South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act (Part 7).

SECTION 62-5-302.

~~The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.~~

(1) A parent, by will, may appoint a guardian for an unmarried adult child whom the parent believes is an incapacitated person. The testamentary appointment by a parent becomes effective when, after having given twenty days prior written notice of intention to the incapacitated person and any person to whom notice is required under Section 62-5-303(1), the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if both parents are dead or the surviving parent is adjudged incapacitated prior to the will being probated. If both parents are deceased, an effective appointment by the surviving parent has priority over any appointment by the first deceased parent. The denial of probate in formal proceedings terminates a testamentary appointment of guardian under this section.

(2) An individual, by will, may appoint a guardian for the individual's spouse whom the appointing spouse believes is an incapacitated person. The testamentary appointment by a spouse becomes effective when, after having given twenty days prior written notice of his intention to do so to the incapacitated person and any person to whom notice is required under Section 62-5-303(1), the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over a testamentary appointment by a parent, unless it is terminated by the denial of probate in formal proceedings. The denial of probate in formal proceedings terminates a testamentary appointment of guardian under this section.

(3) Upon the filing of acceptance of testamentary appointment under a will probated at the testator's domicile in another state, this state shall recognize a testamentary appointment of a guardian effected by the filing of acceptance of appointment in the manner set forth in subsections (1) and (2) in the county in this state in which the incapacitated person resides.

(4) Upon the filing of written objection to the testamentary appointment by the person for

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<p>SECTION 62-5-303. Procedure for court appointment of a guardian of an incapacitated person.</p> <p>(a) The incapacitated person or a person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.</p> <p>(b) Upon the filing and service of the summons and the petition the court shall send a visitor to</p>	<p><u>whom a testamentary appointment of guardian has been made or by any person to whom notice is required under Section 62-5-303(1), the appointment is terminated. The filing of written objection to the testamentary applicant shall be with the court in which the will was probated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the succeeding section of this Part.</u></p> <p><u>(5) The appointment of a guardian under this section is not an adjudication of incapacity.</u></p> <p><u>(6) Upon the testamentary appointment becoming effective, the testamentary guardian shall be deemed to have been appointed by the court and the court shall issue a certificate of appointment to the testamentary guardian who shall have all of the rights, duties and responsibilities of a guardian under this part.</u></p> <p>REPORTER’S COMMENTS</p> <p>Prior to the 2012 amendment, Section 62-5-302 was Section 62-5-301.</p> <p>Section (1) provides for appointment of a guardian for an unmarried adult child by will of a parent. Notice is required to be given to those to whom notice is required in 62-5-303(1). Because of the presumption that an individual is not incapacitated until proven otherwise, the language of this subsection was amended to assume not the incapacity of the individual, but rather that the parent has a belief that the individual is incapacitated.</p> <p>Section (2) provides for appointment of a guardian by will of a spouse. Similar changes were made to former Section 62-5-301(B) as were made to former Section 62-5-301(A).</p> <p>Section (4) allows for the person for whom testamentary appointment is sought, as well as anyone to whom notice was required to be sent, to object to the appointment. If any of those entitled to object do so, the appointment is terminated.</p> <p>Section (5) and (6) were added to clarify that the appointment of a guardian under this section is not an adjudication of incapacity and that once effective, a guardian appointed under this section is deemed to have the same rights, duties and responsibilities as a guardian appointed through court proceedings under this part.</p> <p>SECTION 62-5-303.</p> <p>(a) The incapacitated person or a person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.</p> <p>(b) Upon the filing and service of the summons and the petition the court shall send a visitor</p>

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the place where the allegedly incapacitated person resides to observe conditions and report in writing to the court. The court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceedings and that attorney shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by two examiners, one of whom shall be a physician appointed by the court who shall submit their reports in writing to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence including testimony by a physician of his own choosing, to cross-examine witnesses, including the court-appointed examiners. The issue may be determined at a closed hearing if the person alleged to be incapacitated or his counsel so requests.

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~~to the place where the allegedly incapacitated person resides to observe conditions and report in writing to the court. The court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceedings and that attorney shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by two examiners, one of whom shall be a physician appointed by the court who shall submit their reports in writing to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence including testimony by a physician of his own choosing, to cross-examine witnesses, including the court-appointed examiners. The issue may be determined at a closed hearing if the person alleged to be incapacitated or his counsel so requests.~~

(1) An alleged incapacitated person or any person interested in the welfare of the primary respondent may petition the court for a finding of incapacity and, if appropriate, for the appointment of a guardian with limitation or a guardian without limitation for the alleged incapacitated person. The guardianship proceeding is commenced by the filing and service of a summons and verified petition upon the primary respondent and those persons listed in item (2)(d).

(2) The petition shall set forth, to the extent known or reasonably ascertainable, the following information:

- (a) the interest of the petitioner;
- (b) the name, age, and current address of the primary respondent;
- (c) the physical location of the primary respondent during the six month period

immediately preceding the filing of the summons and petition; and, if the primary respondent was not physically present in South Carolina for that period, sufficient information on which the court may make a determination that it has initial jurisdiction pursuant to Section 62-5-707;

(d) the names and addresses of the following persons whose identity and whereabouts are known or reasonably ascertainable:

- (i) the primary respondent's spouse;
- (ii) the primary respondent's adult children;
- (iii) if there is no spouse or adult child, the primary respondent's parents;
- (iv) if there is no spouse, adult child, or parent, at least one of the primary respondent's adult relatives with the nearest degree of kinship;

(v) any person known to have been appointed as agent for the primary respondent under a general durable power of attorney or health care power of attorney;

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(vi) any person who under Section 62-5-305 has equal or greater priority for appointment as guardian with the person whose appointment the petition advocates;
(vii) any person with whom the primary respondent resides outside of a health care facility, group home, homeless shelter, or prison; and
(viii) any person, other than an unrelated employee or health care worker, who is known or reasonably ascertainable by the petitioner to have materially participated in caring for the primary respondent within the six month period preceding the filing of the petition with the court;
(e) the name and address of the person whose appointment is sought and the basis of his priority for appointment;
(f) the reason why guardianship is necessary, including a brief description of the nature and extent of the primary respondent's alleged incapacity;
(g) whether the petitioner is requesting the appointment of a guardian with limitation or a guardian without limitation and, if a guardian without limitation is requested, the reason why a guardian with limitation is inappropriate; or, if a guardian with limitation is requested, the restrictions sought to be imposed on the primary respondent and the limitations sought to be imposed on the guardian's powers and duties; and
(h) a general statement of the primary respondent's assets, with an estimate of its value, and the source and amount of any income of the primary respondent.
(3) Upon the filing of the summons and petition with the court and proof of service of the summons and petition upon the primary respondent, the court must appoint a guardian ad litem for the primary respondent in accordance with Sections 62-5-810 et seq, and the guardian ad litem shall have the duties and responsibilities set forth in Sections 62-5-830. The appointment of a guardian ad litem under this section shall have no effect on the legal capacity of the primary respondent and shall not raise a presumption of incapacity of the primary respondent.
(4) The primary respondent is not required to be represented by counsel but is entitled to be represented by counsel of his choosing. If the primary respondent is not represented by counsel, then:
(a) upon the request of the primary respondent, the court may allow the primary respondent to proceed pro se or instruct the guardian ad litem to assist the primary respondent in obtaining counsel; or
(b) upon the request of the primary respondent, guardian ad litem, any party, or upon the court's own motion, the court may appoint counsel for the primary respondent. Nothing in this subsection shall be construed to require an attorney to accept an uncompensated appointment. During the pendency of any guardianship proceeding, any attorney purporting to represent the

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primary respondent shall file a notice of appearance with the court. Fees for counsel retained by a primary respondent who is determined to be incapacitated shall be subject to approval by the court.

(5) Upon the filing of the summons and petition with the court and proof of service of the summons and petition upon the primary respondent, the court shall appoint an examiner, who shall be a physician, to examine the primary respondent and report to the court the physical and mental condition of the primary respondent. Upon the motion or written request of the guardian ad litem, the primary respondent, any party or on its own motion, the court may appoint one or more additional examiners, who may be a physician or any other person the court determines qualified to evaluate the primary respondent's alleged impairment. If the court appoints any additional examiners, the court shall set out in the order appointing the examiner why an additional examiner is necessary and why the appointed examiner is appropriate to serve in that capacity. Each examiner shall complete a verified report evaluating the condition of the primary respondent and file his original report with the court or deliver the original report to the guardian ad litem, who without undue delay must file the report with the court by the deadline set by the court, but not less than forty-eight hours prior to any hearing in which the report will be introduced as evidence. For good cause, the court may allow admission of an examiner's report filed less than forty-eight hours prior to the hearing. All parties to the proceeding are entitled to copies of examiners' reports. An examiner's report shall evaluate the condition of the primary respondent and shall contain, to the best information and belief of the examiner:

- (a) a description of the nature, type, and extent of the primary respondent's incapacity, including the primary respondent's specific functional impairments;
- (b) a diagnosis and assessment of the primary respondent's mental and physical condition, including a statement as to whether the primary respondent is on any medications that may affect his actions or demeanor;
- (c) where appropriate and consistent with the scope of the examiner's license, an evaluation of the primary respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;
- (d) the date or dates of the examinations, evaluations, and assessments upon which the report is based;
- (e) the identity of those persons with whom the examiner met or consulted regarding the primary respondent's mental or physical condition; and
- (f) the signature of the examiner and the nature of any professional license held by the examiner. Unless otherwise directed by the court, in preparing a report for the court, the examiner may rely upon an examination conducted by the examiner within the ninety-day

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period immediately preceding the filing of the petition. In the absence of bad faith or malicious intent, an examiner appointed by the court and performing an examination and submitting a report under this section shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section. A report prepared pursuant to this section shall be admissible as evidence of the facts stated therein and the results of the examination or evaluation referred to therein.

(6) As soon as the interests of justice may allow, but after the time for filing a response to the petition has elapsed as to all parties served, the court must hold a hearing on the merits of the petition. The primary respondent, all parties, and any person who has filed a demand for notice pursuant to subsection (7), must be given notice of the hearing as provided in Section 62-1-401. The primary respondent shall attend the hearing, unless excused by the court for good cause. In determining good cause, the court may consider affidavits submitted by the guardian ad litem or any interested persons.

(7) Any interested person who desires to be notified before any order is made in a guardianship proceeding may file with the court a demand for notice. The court shall mail a copy of the demand to the guardian, if one has been appointed, or to the petitioner, if no guardian has been appointed. A demand for notice is not effective unless it contains a statement indicating the nature of the interest of the person filing the demand, his address or that of his attorney, and is effective only as to matters occurring after the filing of the demand.

(8) After a hearing, or with the consent of all parties, upon the finding that a basis for the appointment of a guardian has been established as set forth in this section, the court shall make an appointment. A primary respondent represented by counsel may consent through counsel.

REPORTER'S COMMENTS

Section 62-5-303 was significantly revised by the 2012 amendment.

The revised section adds the requirement of a summons and clarifies that a petition must be verified.

The phrase 'any person interest in the welfare of the primary respondent' is intended to be broader than then term 'interested person' defined in 62-1-201. For example, it could include a friend, neighbor, or person residing with the primary respondent.

This section sets out the basic procedure for a finding of incapacity or appointment of a guardian. The section was also amended to provide for both guardianship with limitation and guardianship without limitation.

Section (2) provides detailed requirements for the content of a petition for appointment of

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	<p>conservator or other protective order. While the subsection requires the petitioner to provide only information known to the petitioner, it imposes on the petitioner a duty to engage in a reasonable effort to ascertain the required information. Specifying the required contents of the petition is in accordance with the recommendations of both the Wingspread conference on guardianship reform and the Commission on National Probate Court Standards. See Guardianship: An Agenda For Reform 9 (A.B.A. 1989); National Probate Court Standards, Standard 3.3.1, ‘Petition’ (1993).</p> <p>Subsection (2)(g) emphasizes the importance of limited guardianship, the encouragement of which is a major theme of the Act. The petitioner, when requesting an unlimited guardianship, must state in the petition why a limited guardianship would not work. If a limited guardianship is requested, the petition must set out the recommended powers to be granted to the guardian.</p> <p>A substantive change was made in that the appointment of a visitor is always optional under 62-5-314, but the appointment is no longer required at commencement of the action.</p> <p>Subsection (3) provides for the appointment of a guardian ad litem, upon the filing and service of the verified petition for a finding of incapacity or appointment of a guardian. While appointment of a guardian ad litem occurs without a preliminary assessment of capacity by the court, the subsection makes it clear the mere appointment of the guardian ad litem does not impact the rights of the person allegedly in need of a guardian and the appointment is not evidence of incapacity.</p> <p>With this revision, the roles of counsel and guardian ad litem have been separated. A guardian ad litem is required to be appointed in every case. A guardian ad litem must meet the qualifications set forth in Section 62-5-820, but the guardian ad litem is no longer required to be an attorney. If the guardian ad litem is an attorney, that person may not also serve as counsel for the primary respondent.</p> <p>Subsection (4) provides that the primary respondent is not required to be represented by counsel, but is entitled to be represented by counsel of his own choosing. This subsection sets forth the options of the court when dealing with a primary respondent who is not represented by counsel. This section does not mandate the appointment of counsel, nor is the primary respondent required to be represented by counsel. If the court determines an unrepresented primary respondent should not proceed without counsel, the subsection authorizes the court to appoint counsel for the primary respondent. The subsection also suggests to the court the option of directing the guardian ad litem to assist the person in obtaining counsel. This would be particularly appropriate where the court felt the need for counsel and the person had adequate resources with which to pay counsel. The enhanced duties of the guardian ad litem established by Title 62, Article 5, Part 8, in conjunction with the enhanced qualification for persons acting</p>

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SECTION 62-5-304. Order of appointment; alternatives; limitations on guardian's powers.

- (A) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the procedure.
- (B) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. The court, on appropriate findings, may:
 - (1) treat the petition as one for a protective order under Section 62-5-401 and proceed accordingly;
 - (2) enter another appropriate order; or

as guardian ad litem should provide adequate protection of the interests of the person who is the subject of a guardianship proceeding in most cases.

Subsection (5) provides for the appointment of an examiner in connection with a proceeding for a finding of incapacity or appointment of a guardian, establishes the necessary qualification of the person who will serve as an examiner, sets forth the type of report the examiner is to produce, and the time within which the report is to be produced. Unlike prior law, only one examiner is required. A designated examiner, who is a physician, must be appointed. Additional designated examiners may be appointed by the court. The additional examiners may be physicians or any other person the court has determined is qualified to evaluate the primary respondent's alleged impairment. The subsection also clarifies prior law, by establishing the examiner may make his report from information obtained in an examination conducted prior to the examiner's appointment. If the examiner's report references an examination conducted prior to appointment, it must have been conducted within the 90 days immediately preceding the examiner's appointment; otherwise the examination must occur subsequent to the appointment.

Subsection (6) establishes the requirement of a hearing in regard to the petition, provides who must be given notice of the hearing, and the timing of notice. Note that the subsection mandates attendance at the hearing by the primary respondent absent a showing of good cause.

Subsection (7) provides a procedure for interested persons to obtain notice prior to orders being issued in the proceeding.

Subsection (8) establishes the requirement that the court issue an order in response to a petition and clarifies that such an order may arise by consent of all parties.

SECTION 62-5-304.

- ~~(A)~~(1) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the ~~procedure~~ court's order.
- ~~(B)~~ The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. The court, on appropriate findings, may:
 - ~~(1)~~ treat the petition as one for a protective order under Section 62-5-401 and proceed accordingly;
 - ~~(2)~~ enter another appropriate order; or

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(3) dismiss the proceeding.
(C) The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this article and create a limited guardianship. A limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian’s letters or, in the case of a guardian by parental or spousal appointment, must be reflected in letters issued at the time a limitation is imposed. Following the same procedure, a limitation may be removed or modified and appropriate letters issued.

SECTION 62-5-311. Who may be guardian; priorities.

(A) Any competent person or a suitable institution may be appointed guardian of an incapacitated person.
(B) Subject to a finding of good cause by the court, persons who are not disqualified have priority for appointment as guardian in the following order:
(1) a person nominated to serve as guardian by the incapacitated person;
(2) an attorney in fact appointed by the incapacitated person pursuant to Section 62-5-501, whose authority includes powers relating to the person of the incapacitated person;

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~~(3) dismiss the proceeding.
(C) The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this article and create a limited guardianship. A limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian’s letters or, in the case of a guardian by parental or spousal appointment, must be reflected in letters issued at the time a limitation is imposed. Following the same procedure, a limitation may be removed or modified and appropriate letters issued.~~
(2) The court may adjudicate the primary respondent as incapacitated only if it finds by clear and convincing evidence that the primary respondent is an incapacitated person as defined in Section 62-5-101. If the primary respondent is adjudicated as incapacitated and the primary respondent’s identified needs cannot be met by less restrictive means, the court may appoint a guardian for the primary respondent.
(3) In an order appointing a guardian, the court may appoint a guardian with limitation or a guardian without limitation.
(4) The court shall provide a copy of its orders to all parties to the proceeding.

REPORTER’S COMMENTS

Section 62-5-304 was revised by the 2012 amendment to require a finding of incapacity to meet the clear and convincing standard of review. The court is to exercise its authority to encourage maximum self-reliance. Appointment orders are to be made only to the extent necessitated by the incapacitated person’s mental and adaptive limitations. The court is to appoint a guardian only if the primary respondent is determined to be incapacitated, by clear and convincing evidence, and if the primary respondent’s needs cannot be met by less restrictive means. The section permits the court to consider less restrictive alternatives to guardianship.

SECTION 62-5-305.

~~By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary first class mail at his address as listed in the court records and to his address as then known to the petitioner. In appointing a guardian, the court shall consider persons, who are otherwise qualified, in the following order of priority:~~
(1) a guardian, other than a temporary or emergency guardian, currently acting for the ward

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- (3) the spouse of the incapacitated person. A person who claims to be a common law spouse of the incapacitated person has the burden of proving that status in order to qualify for appointment as a guardian under this provision. A decision by the probate court regarding the status of a common law spouse is for the purpose of guardianship appointment proceedings only and is not binding in any other court of law or in any administrative proceeding;
- (4) an adult child of the incapacitated person;
- (5) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (6) another relative of the incapacitated person;
- (7) a person nominated by the person who is caring for him or paying benefits to him.

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Under Section 62-5-311 any competent person or suitable institution may be appointed as guardian.

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- in this State or elsewhere;
- (2) a person nominated to serve as guardian by the primary respondent prior to his incapacity;
- (3) an attorney in fact appointed by the primary respondent pursuant to Section 62-5-501, whose authority includes powers relating to the person of the incapacitated person;
- (4) the spouse of the primary respondent or a person nominated as testamentary guardian in the will of the primary respondent’s deceased spouse;
- (5) an adult child of the primary respondent;
- (6) a parent of the primary respondent or a person nominated as testamentary guardian in the will of the primary respondent’s deceased parent;
- (7) another relative of the primary respondent;
- (8) a person nominated by the person who is caring for the primary respondent or paying benefits to him.

With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian for the primary respondent. The court, acting in the best interest of the primary respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

REPORTER’S COMMENTS

Section 62-5-305, formerly Section 62-5-311, was revised by the 2012 amendment to comply with the South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act (Part 7) giving highest priority to an individual currently serving as guardian. The list of priorities was further amended to allow a spouse to nominate a guardian by will as is allowed for a parent. Also, the court may deviate from the stated priorities if appointment of a proposed guardian, with lower priority, is in the best interests of the ward.

SECTION 62-5-306.

~~The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in Section 62-5-307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward. (A)Notwithstanding an adjudication of incapacity or the appointment of a guardian, and~~

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unless otherwise ordered by the court, every ward retains the following rights:

- (1) the right to a guardian who acts in the best interest of the ward;
- (2) the right to a guardian who is reasonably accessible to the ward;
- (3) the right to have the ward's property utilized to provide adequately for the ward's support, care, education, health, and welfare;
- (4) the right to communicate freely and privately with persons other than the guardian;
- (5) the right to a reasonably accessible telephone or similar communication device;
- (6) the right to meet or otherwise communicate with legal counsel outside the presence of the guardian;
- (7) the right to notify the court that the ward is being unjustly denied a right or privilege retained under or granted by this section or ordered by the court. Any person who knowingly interferes with transmission of this type of notification to the court may be adjudicated guilty of contempt.
- (8) the right to request re-adjudication of incapacity as set forth in Section 62-5-311(3);

and

- (9) the right to the least restrictive form of guardianship and living environment practicable, taking into consideration the ward's functional limitations, personal needs, and identifiable preferences.

(B) Unless an order of the court specifies otherwise, a finding of incapacity or the appointment of a guardian is not a determination that the ward lacks testamentary capacity or the capacity to create, amend or revoke a revocable trust.

REPORTER'S COMMENTS
Section 62-5-306 is a new section added by the 2012 amendment which lists the rights retained by the ward, unless otherwise ordered by the court. The section also addresses the common law rule that a finding of incapacity is not a determination that the ward lacks testamentary capacity.

SECTION 62-5-307.

~~(a) After service of the summons and petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.~~

~~(b) An order adjudicating or readjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer~~

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~~incapacitated may be filed without special leave. Subject to this restriction, the ward may make a request for an order from the court that he is no longer incapacitated, and for removal of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.~~

~~(e) Before acting upon any such petition or request, the court shall send a visitor to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court. After reviewing the report of the visitor, the court may order termination of the ward's incapacity or a hearing following the procedures set forth in Section 62-5-303.~~

~~(A) Unless the court's order specifies otherwise, an adjudication of incapacity or the appointment of a guardian without limitation shall remove from the ward the following rights and powers:~~

- ~~(1) the right to marry;~~
- ~~(2) the right to reside in a place of the ward's choosing;~~
- ~~(3) the right to travel without the consent of the guardian;~~
- ~~(4) except as otherwise provided in Section 62-5-306(A)(7) and (8), the right to bring or defend any action at law or equity;~~
- ~~(5) the power to make, modify, or terminate contracts;~~
- ~~(6) the power to refuse or consent to medical treatment.~~

~~(B) Upon appointment of a guardian with limitation the court must set forth in the order which rights enumerated in the section are retained by the ward and which are removed from the ward.~~

~~(C) Unless the court's order specifies otherwise, the appointment of a guardian suspends the authority of an agent who was previously appointed by the ward to act as an agent under a durable power of attorney for health care or other advance medical directive. The suspension of the authority of an agent does not abrogate any other directives included in a properly executed advance medical directive.~~

REPORTER'S COMMENTS

Section 62-5-307 is a new section added by the 2012 amendment that lists the rights which are lost when guardianship without limitation or full guardianship is sought. The court may specify that some or all of these rights are retained even in a guardianship without limitation, but the rights are lost if the court does not specify the rights are retained. For limited guardianship, the court must list the specific rights which are lost. For example, an individual may not have the

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<p>SECTION 62-5-305. Acceptance of appointment; consent to jurisdiction.</p> <p>By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary first class mail at his address as listed in the court records and to his address as then known to the petitioner.</p>	<p>capacity to understand his health care needs to the extent necessary to consent to treatment, but he may be able to understand and appreciate the benefits of one living arrangement over another. In that circumstance, a ward may lose the right to make health care decisions but may maintain the right to make decisions about where he resides.</p> <p>SECTION 62-5-308.</p> <p>A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings. <u>By accepting appointment, a guardian submits personally to the jurisdiction of the court in any informal or formal proceeding relating to the guardianship that may be instituted by any interested person. However, all formal proceedings instituted by interested persons are governed by and subject to the rules of civil procedure adopted for the circuit court and other rules of procedure in this title.</u></p> <p>REPORTER'S COMMENTS Prior to the 2012 amendment, Section 62-5-308 was Section 62-5-305. The notice provisions under the previous section 62-5-305 were moved to section 62-5-303.</p> <p>SECTION 62-5-309.</p> <p>(A) In a proceeding that is properly commenced by filing and service of the summons and petition for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, the following persons must be properly served:</p> <ul style="list-style-type: none"> (1) the ward or the person alleged to be incapacitated and his spouse, parents, and adult children; (2) a person who is serving as his guardian, conservator, or attorney in fact under a durable power of attorney pursuant to Section 62-5-501 or who has his care and custody; (3) if no other person is notified under item (1), at least one of his closest adult relatives, if one can be found. <p>(B) Notice of hearing must be given as provided in Section 62-1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is given by his attorneys or, in proceedings for removal, confirmed in an interview with the visitor, which may be done at any time. Representation of the alleged incapacitated person</p>

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<p>SECTION 62-5-306. Termination of guardianship for incapacitated person.</p>	<p>by a guardian ad litem is not necessary. Any guardian ad litem, attorney, examiner, visitor or guardian appointed in a guardianship proceeding is entitled to reasonable compensation from the ward's estate, as determined by the court. In addition, the court has discretion to award, from the ward's estate, reasonable fees and expenses to attorneys involved in the proceeding resulting in an adjudication of incapacity, the appointment of a guardian, or a protective order concerning the primary respondent.</p> <p>REPORTER'S COMMENTS Section 62-5-309 is a new section added by the 2012 amendment explaining how appointees are to be compensated and allowing attorneys to be compensated from the estate of the ward. This change is in response to the decision in Dowaliby v. Chambless, 544 S.E.2d 646 (S.C.App. 2001), and is intended to provide a statutory basis for the court, in its discretion, to award attorney's fees, to be paid from the ward's estate, to attorneys involved in the proceeding.</p> <p>SECTION 62-5-310.</p> <p>(A) If the court makes emergency preliminary findings that:</p> <p style="padding-left: 20px;">(1) a physician has certified to the court, orally or in writing, that the person is incapacitated;</p> <p style="padding-left: 20px;">(2) no guardian has been appointed previously; and</p> <p style="padding-left: 20px;">(3) the welfare of the incapacitated person requires immediate action; then the court, with or without petition or notice, may appoint a temporary guardian for a specified period not to exceed six months in accordance with the priorities set out in Section 62-5-311.</p> <p>(B) If the court makes emergency preliminary findings that:</p> <p style="padding-left: 20px;">(1) the appointed guardian or temporary guardian is not effectively performing his duties; and</p> <p style="padding-left: 20px;">(2) the welfare of the allegedly incapacitated person requires immediate action, then the court may appoint, with or without petition or notice, a temporary guardian for a specified period not to exceed six months in accordance with the priorities set out in Section 62-5-311.</p> <p>(C)(1) The court may itself exercise the power of temporary guardian, with or without petition or notice, if the court makes emergency preliminary findings that either no person appears to have authority to act on behalf of the incapacitated person or more than one person is authorized to make health care decisions for the incapacitated person, and these authorized persons disagree on whether certain care must be provided and:</p> <p style="padding-left: 20px;">(a) the person has been adjudicated as being incapacitated, or a physician has certified</p>

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<p>The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in Section 62-5-307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.</p> <p>SECTION 62-5-307. Removal or resignation of guardian; termination of incapacity.</p>	<p>to the court, orally or in writing, that the person is incapacitated; and (b) an emergency exists. (2) For health care purposes, ‘emergency’ means that a delay caused by (i) further attempts to locate a person authorized to make health care decisions or (ii) proceedings for appointment of a guardian would present a serious threat to the life, health, or bodily integrity of the incapacitated person. (D) If a temporary guardian is appointed without petition or notice under this section, a hearing to review the appointment must be held after petition and notice and within thirty days after the appointment of the temporary guardian. (E) A temporary guardian is entitled to the care and custody of the ward and the authority of a permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make reports the court requires. In other respects the provisions of law concerning guardians apply to temporary guardians. (F) A hearing concerning the need for appointment of a permanent guardian must be a hearing de novo as to all issues before the court. <u>The authority and responsibility of a guardian for a ward terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation of the guardian as provided in Section 62-5-311. Termination does not affect the guardian’s liability for prior acts or his obligation to account for funds and assets of his ward. Upon the death of the ward, the guardian shall file a certified copy of the ward’s death certificate with the court having continuing jurisdiction over the ward within sixty days of the ward’s death and, upon receipt, the court must issue a termination of appointment. Before the termination of the guardian’s appointment, the court may require from the guardian an accounting of any assets held by the guardian on behalf of the ward.</u></p> <p>REPORTER’S COMMENTS Prior to the 2012 amendment Section 62-5-310 was Section 62-5-306. The last two sentences were added to previous Section 62-5-306 to create a procedure for notice to the court if the ward dies. In such event, the court may require an accounting for any assets held by the guardian.</p> <p>SECTION 62-5-311.</p> <p>(A) Any competent person or a suitable institution may be appointed guardian of an incapacitated person. (B) Subject to a finding of good cause by the court, persons who are not disqualified have</p>

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(a) After service of the summons and petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) An order adjudicating or readjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward may make a request for an order from the court that he is no longer incapacitated, and for removal of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(c) Before acting upon any such petition or request, the court shall send a visitor to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court. After reviewing the report of the visitor, the court may order termination of the ward's incapacity or a hearing following the procedures set forth in Section 62-5-303.

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priority for appointment as guardian in the following order:

- (1) a person nominated to serve as guardian by the incapacitated person;
- (2) an attorney in fact appointed by the incapacitated person pursuant to Section 62-5-501, whose authority includes powers relating to the person of the incapacitated person;
- (3) the spouse of the incapacitated person. A person who claims to be a common law spouse of the incapacitated person has the burden of proving that status in order to qualify for appointment as a guardian under this provision. A decision by the probate court regarding the status of a common law spouse is for the purpose of guardianship appointment proceedings only and is not binding in any other court of law or in any administrative proceeding;
- (4) an adult child of the incapacitated person;
- (5) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (6) another relative of the incapacitated person;
- (7) a person nominated by the person who is caring for him or paying benefits to him.

(1) Upon the filing of a summons and petition, and service upon the primary respondent, the guardian, and other parties set forth in Section 62-5-303(2)(d), the ward or any person interested in his welfare may file a summons and petition for the removal of a guardian and, if necessary, appointment of a successor guardian. If the court determines that it is in the best interests of the ward, the court may remove the guardian and, if necessary, appoint a successor guardian.

(2)(A) If co-guardians are appointed by the court, one of the co-guardians may resign by filing a statement of resignation and, upon filing, the court may informally confirm the appointment of the remaining co-guardian as sole guardian for the ward or the court may, in its discretion, require the commencement of a formal proceeding under Section 62-5-303.

(B) If no co-guardian is then serving, a guardian seeking to resign must file a summons and petition for discharge and appointment of a successor guardian. Upon the filing of a summons and petition by the guardian and service upon the primary respondent and other parties set forth in Section 62-5-303(2)(d), the court may accept the resignation of the guardian and make any other order which may be appropriate. Resignation of a guardian is not effective until a successor is appointed and has qualified.

(3)(A) A request for an order readjudicating incapacity may be made by informal letter to the court by the guardian or the ward. Any person who knowingly interferes with the transmission of this type of request to the court or judge may be adjudged guilty of contempt. The court may issue an order specifying a minimum period, not exceeding one year, during which no petition for re-adjudication that the ward is no longer incapacitated may be filed without special leave of the court. Subject to this restriction, the ward or the guardian may petition or make a request for

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SECTION 62-5-310. Temporary guardians.

an order from the court that the ward is no longer incapacitated and for termination of the guardianship.

(B) Before acting upon any such petition or request, the court shall send a guardian ad litem to the place where the ward resides or is detained to observe conditions and report in writing to the court. After reviewing the report, the court may order the termination of the ward's incapacity solely on the basis of the guardian ad litem's report or require the filing of a summons and petition for discharge and termination of the guardianship following the procedures set forth in Section 62-5-303. The court may issue an interim order, for a period not to exceed ninety days, regarding the care of the ward until a hearing is held and a final order is issued.

Reporter's Comments

Prior to the 2012 amendment, Section 62-5-311 was Section 62-5-307. The section was reorganized for clarity and amended to require a summons and petition and allow for an interim order pending a hearing and final order.

SECTION 62-5-312.

~~(a) A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:~~

~~(1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State.~~

~~(2) If entitled to custody of his ward he shall make provision for the care, comfort, and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his ward is in need of protection.~~

~~(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.~~

~~(4) If no conservator for the estate of the ward has been appointed or if the guardian is~~

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<p>(A) If the court makes emergency preliminary findings that:</p> <p>(1) a physician has certified to the court, orally or in writing, that the person is incapacitated;</p> <p>(2) no guardian has been appointed previously; and</p> <p>(3) the welfare of the incapacitated person requires immediate action; then the court, with or without petition or notice, may appoint a temporary guardian for a specified period not to exceed six months in accordance with the priorities set out in Section 62-5-311.</p> <p>(B) If the court makes emergency preliminary findings that:</p> <p>(1) the appointed guardian or temporary guardian is not effectively performing his duties; and</p> <p>(2) the welfare of the allegedly incapacitated person requires immediate action, then the court may appoint, with or without petition or notice, a temporary guardian for a specified period not to exceed six months in accordance with the priorities set out in Section 62-5-311.</p> <p>(C)(1) The court may itself exercise the power of temporary guardian, with or without petition or notice, if the court makes emergency preliminary findings that either no person appears to</p>	<p>also conservator, he may:</p> <p>(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;</p> <p>(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but, he may not use funds from his ward's estate for room and board or services which he, his spouse, parent, or child have furnished the ward unless a charge for the services and/or room and board is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.</p> <p>(5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule, but at least on an annual basis.</p> <p>(6) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this Code, and the guardian must account to the conservator for funds expended.</p> <p>(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.</p> <p>(1) <u>The procedure for appointment of a temporary guardian with notice is as follows:</u></p> <p>(A) <u>In the case of a person who has no guardian or temporary guardian:</u></p> <p>(i) <u>following the filing of a summons and verified petition for appointment of guardian and service upon the primary respondent, any party may move the court for an order appointing a temporary guardian for the primary respondent;</u></p> <p>(ii) <u>unless made during a hearing in open court, the motion shall be in writing, and shall state with particularity:</u></p> <p>(a) <u>the name and address of the proposed temporary guardian and that person's relationship to the primary respondent;</u></p> <p>(b) <u>to the extent known or reasonably ascertainable, those persons whose priority for appointment under Section 62-5-305 are higher than the priority of the proposed temporary guardian; and</u></p> <p>(c) <u>why the appointment of a temporary guardian is necessary for the welfare of the</u></p>

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have authority to act on behalf of the incapacitated person or more than one person is authorized to make health care decisions for the incapacitated person, and these authorized persons disagree on whether certain care must be provided and:

- (a) the person has been adjudicated as being incapacitated, or a physician has certified to the court, orally or in writing, that the person is incapacitated; and
- (b) an emergency exists.

(2) For health care purposes, "emergency" means that a delay caused by (i) further attempts to locate a person authorized to make health care decisions or (ii) proceedings for appointment of a guardian would present a serious threat to the life, health, or bodily integrity of the incapacitated person.

(D) If a temporary guardian is appointed without petition or notice under this section, a hearing to review the appointment must be held after petition and notice and within thirty days after the appointment of the temporary guardian.

(E) A temporary guardian is entitled to the care and custody of the ward and the authority of a permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make reports the court requires. In other respects the provisions of law concerning guardians apply to temporary guardians.

(F) A hearing concerning the need for appointment of a permanent guardian must be a hearing de novo as to all issues before the court.

REPORTER'S COMMENTS

Section 62-5-310 allows the court to appoint a temporary guardian without petition and in effect could remove or appoint a temporary guardian without a formal hearing process.

SECTION 62-5-309. Service and notice in guardianship proceedings.

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primary respondent.

(B) In the case of a person for whom a guardian or temporary guardian has previously been appointed, and that appointment has not been terminated through an adjudication of capacity:

(i) any party may move the court for an order appointing a temporary guardian for the ward;

(ii) unless made during a hearing in open court, the motion shall be in writing and shall state with particularity:

(a) the name and address of the proposed temporary guardian and that person's relationship to the ward;

(b) to the extent known or reasonably ascertainable, those persons whose priority for appointment under Section 62-5-305 are higher than the priority of the proposed temporary guardian;

(c) why the current guardian or temporary guardian cannot or is not adequately fulfilling the guardian's duties to the ward; and

(d) why the appointment of a temporary guardian is necessary for the welfare of the ward.

(C) As soon as practicable after the filing of a motion for appointment of temporary guardian, the court shall set a hearing on the motion.

(D) Notice of the hearing on the motion as provided in Section 62-1-401 must be given to the ward or primary respondent, and those persons listed in Section 62-5-303(2)(d).

(E) At or following the hearing convened for the purpose of considering the appointment of a temporary guardian, the court may appoint a temporary guardian for a ward or primary respondent, if the court makes findings that:

(i) no guardian has been appointed for the primary respondent or the guardian or temporary guardian for a ward is not effectively performing his duties;

(ii) in the case of a person for whom there has been no adjudication of incapacity, a physician has certified to the court, orally or in writing, that the person is incapacitated; and

(iii) the welfare of the ward or primary respondent requires immediate action.

(F) An order appointing a temporary guardian shall:

(i) set forth the duration of the appointment; which, except for good cause shown, shall not exceed six months;

(ii) set forth a concise statement of the evidence submitted at the hearing;

(iii) set forth the findings required under item (1)(E);

(iv) state the reason temporary guardianship is necessary for the welfare of the primary

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(A) In a proceeding that is properly commenced by filing and service of the summons and petition for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, the following persons must be properly served:

(1) the ward or the person alleged to be incapacitated and his spouse, parents, and adult children;

(2) a person who is serving as his guardian, conservator, or attorney in fact under a durable power of attorney pursuant to Section 62-5-501 or who has his care and custody;

(3) if no other person is notified under item (1), at least one of his closest adult relatives, if one can be found.

(B) Notice of hearing must be given as provided in Section 62-1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is given by his attorneys or, in proceedings for removal, confirmed in an interview with the visitor, which may be done at any time. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

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respondent or ward; and

(v) set forth whether the appointment is of a temporary guardian with limitation or a temporary guardian without limitation; and, if a temporary guardian with limitation, the powers and duties of the guardian.

(G) To the extent practicable and consistent with the urgency of the needs of the primary respondent or ward, in appointing a temporary guardian the court shall consider persons, who are otherwise qualified, in the same order of priority it does in appointments of guardians under Section 62-5-305.

(2) The procedure for the emergency appointment of a temporary guardian is as follows:

(A) any person interested in the welfare of a ward or primary respondent, may file a motion for the emergency appointment of a temporary guardian;

(B) upon receipt of the motion, the court may issue an order ex parte or schedule a hearing with such notice as the court may prescribe, all as the interests of justice and the needs of the ward or primary respondent require;

(C) no order appointing a temporary guardian for a ward or primary respondent shall issue except as provided in Section 62-3-312(1), unless (i) the subject of the motion has previously been adjudicated incapacitated or (ii) a physician has certified to the court, orally or in writing, that in that physician's opinion the person is incapacitated, and it clearly appears from specific facts, shown by affidavit or by a verified petition for appointment of guardian, that an emergency exists;

(D) an emergency order appointing a temporary guardian shall be endorsed with the date of issuance, filed in the record of the case, and served, together with a summons and verified petition for appointment of guardian, in the event no summons and verified petition have previously been served in the action and no guardian has previously been appointed, upon the ward or primary respondent, and those persons required to receive notice of a summons and petition for guardianship under Section 62-5-303;

(E) an emergency order appointing a temporary guardian must state the nature of the emergency, and, if no notice was required, state the reason the order was granted without notice;

(F) An emergency order appointing a temporary guardian shall expire by its terms within such time after entry, not to exceed thirty days, as the court fixes, unless within the time so fixed in the order, for good cause shown, the order is extended for a like period. The reasons for the extension shall be set forth in the order granting the extension;

(G) on two days' notice to the party who obtained the emergency order appointing a temporary guardian, or upon shorter notice to that party as the court may prescribe, the primary respondent, ward, or any party opposed to the order may appear and move its dissolution or

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modification, and in that event, the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require;

(H) unless limited by the court, an emergency temporary guardian has the powers and duties of a guardian without limitation;

(3) The court may exercise the powers of temporary guardian, with or without petition or notice, if the court makes findings that:

(A) no person appears to have authority to act on behalf of a person or more than one person is authorized to make health care decisions for the person, and these authorized persons disagree on whether certain care must be provided;

(B) the person has been adjudicated as being incapacitated, or a physician has certified to the court, orally or in writing, that the person is incapacitated; and

(C) an emergency exists.

(4) For purposes of this section, ‘emergency’ means:

(A)(i) no person appears to have authority to act on behalf of a ward or primary respondent;

(ii) the guardian is not adequately fulfilling the guardian’s duties to the ward;

(iii) the agent acting pursuant to a durable power of attorney authorizing the agent to make health care decisions is not adequately fulfilling the agent’s duties to the principal; or

(iv) more than one person is authorized to make health care decisions for the person, and those authorized persons disagree on whether certain care will or will not be provided; and

(B) the delay associated with further attempts to locate a person authorized to make health care decisions for the person, to resolve a dispute between multiple persons authorized to act for the person, or to comply with the procedures set forth in subsection (1) would present a serious threat to the life, health, or bodily integrity of the ward or primary respondent.

(5) The authority of a permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any reports that the court requires. In general the provisions of law concerning guardians apply to temporary guardians.

(6) A hearing concerning the need for appointment of a permanent guardian must be a hearing de novo as to all issues before the court.

REPORTER’S COMMENTS

Prior to the 2012 amendment, Section 62-5-312 was Section 62-5-310. The section provides for three possibilities: (1) a temporary guardian can be appointed after notice and a hearing, (2) if there is an emergency, a temporary guardian can be appointed ex parte, or (3) the court may act

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SECTION 62-5-312. General powers and duties of guardian.

(a) A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State.

(2) If entitled to custody of his ward he shall make provision for the care, comfort, and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

as a guardian in an emergency. All three procedures require the filing of a summons and petition. A temporary appointment requires proof that it is necessary for the welfare of the primary respondent or ward. An emergency appointment requires a finding that an emergency exists. Emergency is defined in the section and means that not only is there not someone acting on behalf of the ward or primary respondent's best interest, but also that delay would present a serious threat to the life, health, or bodily integrity of the ward or primary respondent. The emergency order is not to exceed 30 days unless the court finds, for good cause shown, that the order should be extended. A hearing on the need for appointment of a permanent guardian must be a de novo hearing on all issues before the court.

SECTION 62-5-313.

~~(a) The court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, has jurisdiction over resignation, removal, accounting, and other proceedings relating to the guardianship.~~

~~(b) If the court which appointed the guardian, or in which acceptance of appointment is filed, being the court in which proceedings subsequent to appointment are commenced, determines that the proceedings more appropriately belong in the court located where the ward resides, the first court shall notify the other court, in this or another state, and after consultation with the other court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.~~

(1) Except as otherwise limited by the court, a guardian shall:

(a) make decisions regarding the ward's health, education, maintenance and support;

(b) exercise authority only as necessitated by the ward's limitations and, to the extent possible, encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs;

(c) consider the expressed desires and personal values of the ward to the extent known to or reasonably ascertainable by the guardian;

(d) act in the ward's best interest and exercise reasonable care, diligence, and prudence;

(e) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(f) take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

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(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

(4) If no conservator for the estate of the ward has been appointed or if the guardian is also conservator, he may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but, he may not use funds from his ward's estate for room and board or services which he, his spouse, parent, or child have furnished the ward unless a charge for the services and/or room and board is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

(5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule, but at least on an annual basis.

(6) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this Code, and the guardian must account to the conservator for funds expended.

(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

REPORTER'S COMMENTS

Section 62-5-312(1) would allow the guardian to establish the ward's place of abode within or without the State.

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(g) expend money of the ward that has been received by the guardian for the ward's current needs for health, education, maintenance and support;

(h) conserve any excess money of the ward for the ward's future needs; provided, however, if a conservator has been appointed for the estate of the ward, the guardian immediately shall pay the ward's money and deliver the ward's property to the conservator;

(i) immediately notify the court if the ward's condition has changed to the extent that the ward is capable of exercising rights previously removed; and

(j) inform the court of any change in the ward's custodial dwelling or address.

(2) Except as otherwise provided by law or by the court, a guardian shall have the following powers:

(a) The guardian shall make decisions regarding the ward's health, education, maintenance and support.

(b) A guardian of a ward has the same powers, rights, and duties respecting the ward that a parent has for an unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward nor is the guardian financially responsible for the ward solely by reason of his appointment as guardian. If a ward is in a facility licensed by the Department of Health and Environmental Control, the guardian is not responsible for placement in another facility or for providing care for the ward in the home of the guardian; however, the guardian is responsible for determining that the ward is receiving adequate and appropriate care and must cooperate in identifying alternative placement, if necessary, to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to the detention or commitment of the ward.

(c) A guardian is entitled to custody of the person of his ward and may establish the ward's place of residence within this state. The guardian may establish the ward's place of residence outside of this state upon express authorization of the court and in accordance with the provisions of Section 62-5-714.

(d) A guardian shall take reasonable care of his ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of the ward is in need of protection.

(e) A guardian may give any consents, denials, or approvals that may be necessary to enable the ward to receive or refuse to receive medical or other professional care, counsel, treatment, or service, including institutional care. If there is no conservator and placement or care of the ward requires the execution of an admission agreement or other documents for the ward's placement in a facility, the guardian may execute such documents on behalf of the ward, without incurring personal liability as to the placement or care of the ward.

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(f) If no conservator for the estate of the ward has been appointed, the guardian may:

- (i) apply for and institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform such duty;
- (ii) receive money and tangible property deliverable to the ward up to an aggregate sum of ten thousand dollars per calendar year and apply the money and property for support, care, and education of the ward. However, he may not use funds from his ward's estate for room and board or services which the guardian or the guardian's spouse, parent, or child have furnished the ward unless approved by application to the court after notice to at least one next of kin of the ward who has no interest in the application for approval. The court may approve or decline to approve any application for approval or in its discretion require the commencement of a formal proceeding for approval. A guardian must exercise care to conserve any excess funds for the ward's needs. If a guardian receives money or tangible property deliverable to the ward, he must account to the court for the receipt and disbursement of the property annually and, if the amount held exceeds the sum of ten thousand dollars, he must petition for the appointment of a conservator for the ward.

(g) If reasonable under all of the circumstances, a guardian may delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(h) A guardian, by a properly executed special durable power of attorney, may delegate to another person, for a period not to exceed sixty days, any of his powers regarding the care and custody of the ward. The original power of attorney must be filed with the court having jurisdiction over the guardianship.

(3)(a) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, clothing, and other reasonable and proper expenses for the benefit of the ward, but only after application to the court for approval and notice to at least one next of kin of the ward who has no interest in the application for approval. The court may approve or decline to approve any application for approval or in its discretion require the commencement of a formal proceeding for approval. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the wrongful conduct of the third person.

(4) A guardian is required to report in writing the condition of his ward and of the ward's estate that has been subjected to the guardian's possession or control, as required by the court or

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	<p data-bbox="1360 246 2497 272"><u>court rule, but at least on an annual basis. The court shall receive and review the annual reports.</u></p> <p data-bbox="1360 344 1709 370">REPORTER’S COMMENTS</p> <p data-bbox="1360 376 2421 474">Prior to the 2102 amendment, Section 62-5-313 was Section 62-5-312. The section was amended to be consistent with the South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act (Part 7).</p> <p data-bbox="1360 480 2497 643">The duties of the guardian are listed under subsection (1) and pursuant to subsection (4) include a report to be made to the court as the court requires, but at least annually. The guardian is to become or remain knowledgeable about the condition of the ward, to consider the ward’s expressed desires and values in making decisions, to encourage the ward to regain independence, and to perform other duties specifically listed.</p> <p data-bbox="1360 649 2497 876">Each court is encouraged to establish a system for monitoring guardianships, which would include, but not be limited to, mechanisms for assuring that annual reports are timely filed and reviewed. An independent monitoring system is crucial for a court to adequately safeguard against abuses in the guardianship cases. Monitors can be paid court personnel, court appointees or volunteers. For a comprehensive discussion of the various methods for monitoring guardianships, see Sally Balch Hurme, Steps to Enhance Guardianship Monitoring (A.B.A. 1991).</p> <p data-bbox="1360 883 2497 1110">The National Probate Court Standards also provide for the filing of reports and procedures for monitoring guardianships. See National Probate Court Standards, Standards 3.3.14 ‘Reports by the Guardian,’ and 3.3.15 ‘Monitoring of the Guardian’ (1993). The National Probate Court Standards additionally contain recommendations relating to the need for periodic review of guardianships and sanctions for failures of guardians to comply with reporting requirements. See National Probate Court Standards, Standards 3.3.16 ‘Reevaluation of Necessity for Guardianship,’ and 3.3.17 ‘Enforcement.’</p> <p data-bbox="1360 1117 2497 1312">The guardian has authority to make decisions on behalf of the ward, unless otherwise provided by law or the court. The section was amended to make it clear that the guardian is not financially responsible for the ward solely by reason of appointment as a guardian. The guardian is not required to provide care for the ward in the guardian’s home. If the ward is in a facility licensed by DHEC, then the guardian does not have to place the ward in another facility, but does have to ensure that the ward is receiving adequate and appropriate care.</p> <p data-bbox="1360 1318 2497 1409">The guardian may receive money and tangible property deliverable to the ward up to an aggregate sum of \$10,000 per calendar year and apply the money for the support, care, and education of the ward. If the cumulative amount exceeds \$10,000, then the guardian must</p>

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<p>SECTION 62-5-308. Visitor in guardianship proceeding.</p> <p>A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings.</p> <p>SECTION 62-5-313. Proceedings subsequent to appointment; venue.</p> <p>(a) The court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, has jurisdiction over resignation, removal, accounting, and other proceedings relating to the guardianship.</p> <p>(b) If the court which appointed the guardian, or in which acceptance of appointment is filed, being the court in which proceedings subsequent to appointment are commenced, determines that the proceedings more appropriately belong in the court located where the ward resides, the</p>	<p>petition for the appointment of a conservator for the ward.</p> <p>If reasonable to do so, the guardian may delegate responsibility for certain decisions to the ward. Also, for a period not to exceed sixty days, the guardian may delegate the care and custody of the ward under a properly executed special durable power of attorney. The original power of attorney must be filed with the court.</p> <p>Subsection (3) provides that the guardian is entitled to reasonable compensation for services as guardian and reimbursement for expenses provided on behalf of the ward. The amount determined to be reasonable may vary from state to state and from one geographical area to another within a state. In addition, factors to be considered by the court in setting compensation will vary. Court approval is required unless a conservator, not affiliated with the guardian, has been appointed. Also, if the guardian exercises reasonable care in choosing a third person to provide care or services on behalf of the ward, the guardian is not liable for the wrongful conduct of the third person. The guardian is liable only if personally at fault.</p> <p><u>SECTION 62-5-314.</u></p> <p><u>At any time during a guardianship proceeding, the court may appoint a visitor to carry out the investigation as the court directs, including meeting with the primary respondent or ward and with the guardian, if a guardian has previously been appointed, conducting interviews, observing conditions, and reporting back in writing to the court as the court so directs. A copy of the reports must be promptly provided by the visitor to all parties.</u></p> <p>REPORTER’S COMMENTS Prior to the 2012 amendment, Section 62-5-314 was section 62-5-308. A visitor is defined in Section 62-5-101 (23). A visitor is not required in a guardianship proceeding, but the court may appoint a visitor at any time during the proceedings.</p> <p><u>SECTION 62-5-315.</u></p> <p><u>(1) The court which appointed the guardian, or in which acceptance of a testamentary appointment has been filed, has jurisdiction over resignation, removal, accounting, modification, and other proceedings relating to the guardianship. The court which appointed the guardian must maintain jurisdiction over the guardianship until such time as:</u></p> <p><u>(A) the proceeding is terminated pursuant to Section 62-5-310, termination of guardianship at death of ward;</u></p>

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<p>first court shall notify the other court, in this or another state, and after consultation with the other court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.</p> <p>REPORTER'S COMMENTS Section 62-5-313 provides primary jurisdiction in the court which appointed the guardian and secondary jurisdiction in the court where the ward presently resides.</p>	<p><u>(B) the proceeding is terminated pursuant to Section 62-5-311(3), termination of incapacity;</u> <u>(C) there is a completed transfer of the proceeding to another county's jurisdiction pursuant to subsection (2); or</u> <u>(D) there is a completed transfer of the proceedings to another state pursuant to Section 62-5-714.</u> <u>(2) If the court which appointed the guardian, or in which acceptance of appointment is filed, being the court in which proceedings subsequent to appointment are commenced, determines that the proceedings more appropriately belong:</u> <u>(A) in another county of this state, the first court shall notify the other court and, after consultation with the other court, determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever shall be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed; or</u> <u>(B) in another state, the first court shall follow the procedures set forth in Section 62-5-714.</u></p> <p>REPORTER'S COMMENTS Prior to the 2012 amendment Section 62-5-315 was previously section 62-5-313. The section was amended to provide consistency with the South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act (Part 7). A case may be transferred if it is in the ward's best interest to do so.</p>